

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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In the Matter of)

ICO SERVICES LIMITED)

Petition for Expedited Rule Making to)
Establish Eligibility Requirements for the)
2 GHz Mobile Satellite Service)

To: The Commission

RM No. 9328

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF THE ICO USA SERVICE GROUP

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| SUMMARY | ii |
| I. ICO Seeks Approval to Commence Service Without Delay and the Adoption of Eligibility Rules Modeled After the Big LEO Licensing Provisions. | 2 |
| II. ICO Neither Seeks to Exclude the License Applications of Existing MSS Licensees Nor Intends to Monopolize Access to the 2 GHz Spectrum. | 3 |
| III. ICO's Proposal for a Bifurcated Service Rules Proceeding is Consistent With Commission Precedent. | 7 |
| IV. The Commission Should Dismiss the Comments of MCHI, Which Mistakenly Rely on the 2 GHz Allocation Proceeding When Addressing Service Rules Matters. | 11 |
| V. Conclusion | 14 |

SUMMARY

The ICO USA Service Group (“IUSG”) urges the Commission to reject the misleading views expressed in the comments opposing the Petition for Expedited Rule Making to Establish Eligibility Requirements for the 2 GHz Mobile Satellite Service filed by ICO Services Limited (“ICO”), and to immediately commence the service rules proceeding and establish the eligibility requirements proposed by ICO.

With its petition, ICO seeks expedited adoption of a service rules proceeding for MSS at 2 GHz. The clear intent behind ICO’s request is to enable new entrants to the MSS market, like ICO, to provide their proposed service when ready, without having to wait years for the currently undeveloped systems of other applicants to become acceptable for licensing. ICO also seeks Commission adoption of 2 GHz MSS eligibility requirements modeled after the Big LEO licensing provisions. Significantly, no commenter opposed this request, nor offered any justification for subjecting the 2 GHz MSS and Big LEO services to differing regulatory treatment.

Contrary to the comments of the Big LEO licensees, ICO does not seek to exclude Big LEO licensees from receiving 2 GHz MSS licenses. Instead, ICO simply requests that the Commission act on the applications of eligible new entrants and defer to a later date the applications of the Big LEO licensees (and others who, likewise, are not prepared to begin service soon). Deferral of these applications will serve the public interest because none of the Big LEOs has yet to begin providing MSS in the 1.6/2.4 GHz bands

and therefore has no need for any 2 GHz MSS spectrum. ICO also does not intend to monopolize the entire 70 MHz of MSS spectrum at 2 GHz, as some commenters argue. Indeed, ICO recognizes that it will be bound by any band plan eventually adopted by the Commission.

ICO's proposal for a bifurcated service rules proceeding, whereby new entrants are conditionally authorized in the 2 GHz MSS bands subject to subsequent adoption of a band plan and other technical rules, is fully consistent with Commission precedent. As an initial matter, the Commission has the well-settled legal authority to establish threshold license eligibility requirements. In addition, as the Big LEO proceeding demonstrates, the Commission also has shown a willingness to favor eligible applicants over ineligible applicants in the same proceeding. Finally, the Commission has in the past granted licenses to qualified new entrants conditioned on the compliance of later-adopted service rules — which rebuts the arguments of some commenters urging adoption of a band plan before adoption of eligibility requirements.

The Commission should dismiss the comments filed by MCHI, which inexplicably rely on the 2 GHz allocation proceeding when addressing service rule matters. MCHI fails to understand that, with its petition, ICO is simply requesting that the Commission commence a service rules proceeding separate and apart from the allocation proceeding — a request that accords with routine FCC practice.

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To: The Commission

REPLY COMMENTS OF THE ICO USA SERVICE GROUP

The ICO USA Service Group ("IUSG"),¹ by its attorneys and pursuant to Section 1.405(b)² of the Commission's rules, hereby replies to the comments filed in response to the Petition for Expedited Rule Making to Establish Eligibility Requirements for the 2 GHz Mobile Satellite Service filed by ICO Services Limited ("ICO") on July 17, 1998 ("Petition").

IUSG believes that the comments opposing the Petition either misunderstand or conveniently ignore the intent of ICO's request. Thus, IUSG urges the Commission to reject the views expressed in these comments and expeditiously

¹ The IUSG — which is comprised of ICO investors investigating the provision of ICO services in the United States — is a newly formed consortium of telecommunications oriented companies, consisting of British Telecommunications, PLC, Hughes Telecommunications and Space Company, Telecomunicaciones de Mexico, and TRW Inc.

² 47 C.F.R. § 1.405(b).

grant the Petition so that the public interest benefits that will flow from it — namely, the rapid creation of increased competition in the U.S. mobile satellite service (“MSS”) market and the generation of substantial benefits for the U.S. economy — can be fully realized.

I. ICO Seeks Approval to Commence Service Without Delay and the Adoption of Eligibility Rules Modeled After the Big LEO Licensing Provisions.

At the outset, it is essential that the Commission clearly understand what ICO seeks with its Petition. First, ICO seeks Commission adoption of a service rule proceeding for MSS in the 2 GHz band that will ensure that new entrants, like ICO,³ are able to provide their proposed services when ready — without unnecessary procedural delays and having to wait years for the currently undeveloped systems of other applicants to become operational. The bifurcated services rulemaking proceeding which ICO has proposed (see Section III, *infra*) will achieve this goal. Several commenters, including IUSG, support this common sense proposal because it

³ ICO is authorized (subject to appropriate conditions) by the United Kingdom to launch and operate its satellite network, and has complied to date with the stringent due diligence requirements of the U.K. Thus, since the FCC will not authorize another space segment license to ICO, the argument of Constellation Communications, Inc. (“Constellation”) that ICO is impermissibly relying on “pre-licensing construction” to receive preferential treatment by the Commission is meritless. *See* Opposition of Constellation Communications, Inc. (“Constellation Comments”) at 5.

recognizes that further regulatory delays affecting the provision of MSS at 2 GHz in the United States will not serve the public interest.⁴

Second, ICO seeks Commission adoption of 2 GHz MSS eligibility requirements modeled after the licensing provisions adopted in the Big LEO proceeding. None of the comments filed in response to ICO's Petition oppose this request, nor has any commenter provided any substantive basis for concluding that the Big LEO and 2 GHz MSS services should be subjected to differing regulatory treatment. Indeed, Globalstar, L.P. ("Globalstar") affirmatively supports the Petition on this point.⁵ Thus, when considering eligibility requirements, the Commission should not hesitate to adopt an approach for 2 GHz MSS similar to that adopted for MSS Above 1 GHz.

II. ICO Neither Seeks to Exclude the License Applications of Existing MSS Licensees Nor Intends to Monopolize Access to the 2 GHz Spectrum.

Just as it is essential that the Commission understand what ICO seeks with its Petition, IUSG believes that the Commission must understand what ICO does

⁴ See Comments of North American GSM Alliance LLC ("North American GSM Comments") and Comments of Celsat America, Inc. ("Celsat Comments"). The North American GSM Comments and Celsat Comments both commented on certain aspects of the ICO Petition involving service rules. See North American GSM Comments at nn.6-7; Celsat Comments at n.3. However, as the Celsat Comments indicate, these comments can be fully addressed in the rulemaking proposed by ICO and "pose no immediate impediment to the immediate initiation of the proceeding." Celsat Comments at n.3.

⁵ See Comments ("Globalstar Comments") at 1.

not seek. Most critically, and contrary to the comments of three Big LEO licensees⁶ — Constellation, Iridium, Inc. (“Iridium”), and Globalstar — ICO does not seek to *exclude* Big LEO licensees from receiving 2 GHz MSS licenses.⁷ Instead, ICO requests that the Commission simply act now on those applications of new entrants that are otherwise eligible (e.g., satisfy financial qualification requirements) and *defer* to a later date the applications of the Big LEO licensees or others who, in any case, are not prepared to begin service in the near term.⁸

⁶ The comments of the fourth Big LEO licensee, Mobile Communications Holdings, Inc. (“MCHI”), do not “address the substantive proposals set forth in ICO’s petition.” Opposition of Mobile Communications Holding, Inc. to Petition for Expedited Rulemaking of ICO Services Limited (“MCHI Comments”) at n.5. Instead, MCHI uses its comments to request dismissal of ICO’s Petition as premature and repetitive. *Id.* For reasons discussed in Section IV, *infra*, this request is patently without merit.

⁷ See Constellation Comments at 3; Comments of Iridium, LLC (“Iridium Comments”) at 7; Globalstar Comments at 3-4. The Globalstar Comments appear to recognize that ICO only seeks to defer the licensing of the Big LEO applicants. See Globalstar Comments at 2, 6. Nevertheless, language elsewhere in the comments suggests that Globalstar believes that ICO seeks ultimate exclusion, rather than deferral, of existing MSS licensees. For example, Globalstar argues that the “premise” of ICO’s new entrant proposal has been rejected by the Commission when it determined that the spectrum at 2 GHz is available as expansion spectrum for authorized Big LEO systems. See Globalstar Comments at 3. ICO, however, does not dispute the eligibility of Big LEO applicants to receive 2 GHz spectrum. Instead, ICO simply requests that such eligibility be deferred until later when the existing licensees can demonstrate a need for additional MSS spectrum.

⁸ Globalstar argues that the licensing of new entrants is not “rationally related” to the creation of increased competition. See Globalstar Comments at 2. This argument defies logic as it is axiomatic that the introduction of new MSS service providers into the U.S. MSS marketplace will result in additional competition. See

IUSG supports ICO's request for such a procedure for two reasons.

First, none of the Big LEO licensees, for example, has begun to provide MSS in the 1.6/2.4 GHz bands under its existing license and none has a need, compelling or otherwise, for any 2 GHz MSS spectrum in the near term. Even Iridium, which anticipates commencing its Big LEO operations in a matter of weeks,⁹ cannot claim a need for additional MSS spectrum at this time as it will be years before it utilizes its full complement of spectrum at 1.6 GHz. Second, by adopting basic eligibility criteria now and evaluating the licensing of existing MSS licensees and new entrants alike based on these criteria, any initial band plan negotiation that becomes necessary will be greatly simplified. This, in turn, will expedite the provision of 2 GHz MSS in the United States by all eligible applicants, which will increase competition in the MSS market and serve the public interest.¹⁰

⁸(...continued)

Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration, 10 C.R. 750, 754-57 (1997). Globalstar also argues that, in order to make its new entrant proposal complete, ICO needs to provide a market analysis similar to the analysis the Commission considered in the second round of the Little LEO proceeding. See Globalstar at 5-6. This argument is misplaced, however, because in the second round of the Little LEO proceeding, the Commission limited licensing only to new entrants. Here, ICO does not propose any such limit, and instead seeks to license initially those applicants ready to proceed.

⁹ See Iridium Comments at 10.

¹⁰ IUSG also urges the Commission to reject the comments of TMI Communications and Company, Limited Partnership ("TMI") opposing ICO's
(continued...)

IUSG also maintains that ICO does not intend to “lay a claim” to the entire 70 MHz of MSS spectrum at 2 GHz, as some comments filed by the Big LEO licensees argue.¹¹ Rather, ICO intends to coordinate access to this block of spectrum with all eligible entities, and would only maintain access to the entire global portion of the 70 MHz of allocated spectrum until such time as other eligible applicants are licensed and operational.¹² Once this occurs, ICO would be bound — as would all other 2 GHz MSS licensees — by any band plan adopted by the Commission or through intersystem coordination. Thus, ICO’s proposal can hardly be classified as “inequitable” as some comments would have the Commission believe.¹³

¹⁰(...continued)

new entrant policy. Although TMI acknowledges that ICO only seeks to defer, and not to exclude, the licensing of applicants who hold MSS spectrum, it nevertheless opposes what it calls a “grant priority” for new entrants, relying on the “current rules governing 2 GHz MSS.” Comments of TMI (“TMI Comments”) at 5. This argument is baseless because the service rules for MSS at 2 GHz have not yet been established.

¹¹ Iridium Comments at 13. See also Globalstar Comments at 4.

¹² Indeed, the Big LEOs were authorized to construct their systems across the entire 1.6/2.4 GHz band.

¹³ See Iridium Comments at 11. Iridium also argues that a possible consequence of ICO’s proposal could enable ICO “to escape paying its share of the costs to relocate incumbent fixed service licensees now occupying the band” Iridium Comments at n.29. Iridium does not explain how this scenario might unfold, and IUSG is at a loss to determine the circumstances under which it might occur. Accordingly, this argument should be ignored by the Commission.

III. ICO's Proposal for a Bifurcated Service Rules Proceeding is Consistent With Commission Precedent.

In its Petition, ICO requests that the Commission establish eligibility requirements for the MSS in the 2 GHz bands and conditionally authorize new entrants in those bands, subject to the subsequent adoption of a band plan and other technical rules. As a threshold matter, Globalstar challenges ICO's request for a bifurcated rulemaking on the grounds that the establishment of eligibility requirements will result in the preferential treatment of new entrants, which it claims is contrary to the Commission's obligation to treat like applicants equally.¹⁴ Globalstar misunderstands this obligation.

Under United States v. Storer Broadcasting Co.¹⁵ and the long line of cases and Commission decisions that followed, the Commission has the legal authority to establish threshold license eligibility requirements.¹⁶ This precedent notwithstanding,

¹⁴ See Globalstar Comments at 6-7.

¹⁵ 351 U.S. 192 (1956).

¹⁶ See, e.g., Hispanic Information & Telecommunications Network v. FCC, 865 F.2d 1289, 1294 (D.C. Cir. 1989) (Commission may establish threshold eligibility standards by rule and exclude without hearing those applicants plainly failing to meet the standard) (citing Storer, 351 U.S. at 202, 205); Mobile Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., 498 U.S. 211, 228 (1991) ("where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration") (quoting Heckler v. Campbell, 461 U.S. 458, 467 (1983)); American Hospital Ass'n v. NLRB, 499 U.S. 606, 612 (1991) ("even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rule making to resolve certain issues of general applicability . . ."); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Service, 8 FCC Rcd 1659, 1659

(continued...)

Globalstar's argument still fails. All eligibility requirements will tend to favor one applicant over another — that is the nature of the administrative process. Compared to the other applicants, whose system proposals appear speculative or, at best, undeveloped, ICO — authorized by another WTO member country — has taken significant steps towards meeting its goal of commencing its proposed 2 GHz MSS system in the United States in the near term.¹⁷ The advanced development of the ICO system, and the public interest benefits that will accrue from its deployment and implementation in the United States, along with other eligible new entrants, justifies expeditious treatment of all such eligible new entrants by the FCC.¹⁸

ICO's proposal that the Commission give priority to certain 2 GHz MSS applicants over ineligible applicants in the same proceeding is also entirely in keeping with past Commission policy, despite the objections of Globalstar.¹⁹ In cases fundamentally similar to the instant case, the Commission has demonstrated a willingness to favor eligible applicants over ineligible applicants in the same proceeding.

¹⁶(...continued)

(1993) ("It is well established under the Storer line of cases that an agency may limit Ashbacker or other statutory hearing rights by rules establishing threshold eligibility standards designed to serve the public interest").

¹⁷ ICO, in fact, is tentatively scheduled to launch the first satellite in its constellation in December of this year or soon thereafter.

¹⁸ See McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993).

¹⁹ See Globalstar Comments at 6-9.

In establishing rules governing the Big LEO service, for example, the Commission granted priority in obtaining license grants to applicants that were able to demonstrate by November 16, 1994 their financial qualifications to construct, launch and operate for one year an MSS system in the 1.6/2.4 GHz bands over other applicants that could not make such a demonstration by that date.²⁰ The Commission noted that it adopted such a policy consistent with its "paramount objective of securing early implementation of these satellite services."²¹ Wishing, however, to accord some additional consideration to applicants that needed more time to establish their financial qualifications and that had devoted significant time, effort and resources towards establishing the Big LEO service, the Commission held that such applicants that elected to defer their financial showings until January 1996 would not jeopardize their status in the first-round Big LEO processing group vis-a-vis any subsequent applicants.²² Employing this "two-tiered eligibility rule,"²³ the International Bureau ultimately licensed applicants that made successful financial showings in November 1994 as well as those that were not deemed eligible for licenses until a later date. There is no reason why the

²⁰ Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC Rcd 5936, 5952-53 (1994) ("Big LEO Rules Order").

²¹ Id. at 5952.

²² Id. at 5953.

²³ Id.

Commission cannot employ a comparable two-tiered eligibility rule for 2 GHz MSS applicants.²⁴

Several commenters opposed ICO's proposal for a bifurcated service rules proceeding on the grounds that the Commission should require adoption of a band plan before adoption of eligibility requirements.²⁵ IUSG urges the Commission to reject these arguments not only because they would result in unnecessary procedural complications but because ICO's proposal accords with prior FCC decisions as well. In its proceedings regarding Ka-band satellite systems, for example, the International Bureau issued numerous system licenses prior to the time that the Commission had adopted rules for the service. The Bureau acknowledged, in granting the first such license to Teledesic Corporation ("Teledesic"), that the general fixed-satellite service rules under which it evaluated Teledesic's application would have to be modified later in order to incorporate the specifics of Ka-band operations.²⁶ Instead of delaying the issuance of a license to Teledesic until the appropriate rulemaking proceeding could be concluded, however, the

²⁴ Even Globalstar acknowledges that the Commission has authority to give priority to eligible applicants over ineligible applicants in the same proceeding. In its comments, Globalstar notes that "[i]f some applicants do not meet the relevant eligibility requirements [of a licensing proceeding], then, the Commission may opt to consider them at a later date." Globalstar Comments at 7 (citing Big LEO Rules Order, 9 FCC Rcd at 5948-54).

²⁵ See Constellation Comments at 2-3; Globalstar Comments at 6-8; Iridium Comments at 3-6.

²⁶ See Teledesic Corporation, 1997 LEXIS 1414 (Int'l Bur., March 14, 1997) at ¶ 10.

Bureau simply conditioned Teledesic's license on its compliance with all rules later adopted in the Ka-band service rules decision.²⁷ The Commission may therefore grant licenses to eligible new entrants to the 2 GHz MSS conditioned on the compliance of such parties with later-adopted service rules. IUSG believes that the public interest will be greatly and irreparably disserved by delaying the conditional licensing of ICO and other eligible new entrants ready to implement their systems in order to provide applicants with less-developed systems an opportunity — speculative in most cases — to “catch up.” In any case, under ICO’s proposal, all eligible and qualified applicants would have the right to participate in band plan negotiations at some future date as determined by the Commission.²⁸

IV. The Commission Should Dismiss the Comments of MCHI, Which Mistakenly Rely on the 2 GHz Allocation Proceeding When Addressing Service Rules Matters.

Unlike the other comments filed in response to ICO’s Petition, the comments of MCHI oppose the Petition on procedural, not substantive, grounds. Inexplicably, MCHI relies on the 2 GHz allocation proceeding to support its claim that

²⁷ Id.

²⁸ In its Petition, ICO recognizes its obligation to permit the participation of every eligible applicant in any future band plan negotiation, should one become necessary. Thus, the claim that new entrants will have an unfair advantage in resolving spectrum sharing issues is unfounded. See Globalstar Comments at 8.

ICO's Petition is premature and redundant.²⁹ MCHI's reliance on the allocation proceeding is critically misplaced because, with its Petition, ICO is not requesting that the Commission address any matters involving the allocation of MSS at 2 GHz; instead, the Petition requests a separate rulemaking to establish eligibility requirements and new service rules.

MCHI fails to understand that ICO is simply following the same procedural path set out by the Commission during the Big LEO proceeding. In 1992, the Commission commenced two different proceedings addressing MSS Above 1 GHz. In the first, the Commission issued an NPRM to allocate the 1.6/2.4 GHz bands to MSS.³⁰ In the second, the Commission asked for comments regarding the establishment of an advisory committee to negotiate the technical rules appropriate to the provision of MSS at

²⁹ See MCHI Comments at 3-6 (citing, e.g., Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, *Notice of Proposed Rulemaking*, 10 FCC Rcd 3230 (1995); *First Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 7388 (1997)).

³⁰ See Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, *Notice of Proposed Rulemaking and Tentative Decision*, 7 FCC Rcd 6414 (1992). Ultimately, the Commission issued an order allocating these bands to MSS. See Amendment of Section 2.106 of the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, *Report and Order*, 9 FCC Rcd 536 (1994).

1.6/2.4 GHz.³¹ Under this second proceeding, the Commission issued an NPRM proposing the rules and policies for Big LEO services³² and ultimately adopted specific rules.³³ The Commission itself noted that the first of the Big LEO proceedings “related only to the allocation of spectrum and did not address the eligibility of different types of MSS systems to operate in that spectrum.”³⁴

Here, ICO has petitioned the Commission to establish a service rules proceeding separate and apart from the allocation proceeding cited to by MCHI in its comments. Because the issues addressed in the allocation proceeding have no bearing on what ICO has requested, MCHI’s comments should be summarily dismissed.

³¹ See FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations, *Public Notice*, CC Docket No. 92-166, DA 92-1085 (Released August 7, 1992).

³² See Amendment of the Commission’s Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, *Notice of Proposed Rulemaking*, 9 FCC Rcd 1094 (1994).

³³ See Amendment of the Commission’s Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, *Report and Order*, 9 FCC Rcd 5936, 5939 (1994).


³⁴ Amendment of Section 2.106 of the Commission’s Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-Geostationary Satellites, *Memorandum Opinion and Order*, 10 FCC Rcd 3169, 3170 (1995).

V. **Conclusion**

For the foregoing reasons, IUSG requests that the Commission reject the arguments raised in comments opposing ICO's Petition, and immediately commence a service rules proceeding and establish the eligibility requirements for the 2 GHz MSS as proposed by ICO in its Petition.

Respectfully submitted,

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September 11, 1998

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I, Michele S. Gottlieb, do hereby certify that on this 11th day of September, 1998, a true and correct copy of the foregoing Reply Comments of the ICO USA Service Group was served by first-class United States mail, postage prepaid (* or by hand), on the following:

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